

OPEN PUBLIC  
RECORDS:  
PRIVACY:  
SUNSHINE LAW:

Chapter 610, RSMo, generally requires records of public governmental bodies to be open, and the public employee pension database records qualify as such. But the Sunshine law allows a public governmental body to close personally identifiable personnel records and records pertaining to employees, which would include pension database records. The only exception to this allowance is that records of the name, position, salary, and length of service of public employees may not be closed. Accordingly, information in the records consisting of the names and payments to public employees must be disclosed, but the rest may remain closed.

OPINION NO. 93-2012

February 6, 2012

Ms. Denise M. Droege  
Custodian of Records  
Employees Retirement System of the City of St. Louis  
1114 Market Street, Room 900  
St. Louis, Missouri 63101

Dear Ms. Droege:

You ask whether certain data fields in pension database reports must be disclosed pursuant to a Sunshine Law request.

The facts you provided state that, on February 28, 2011, the Board of Trustees of the Employees Retirement System of the City of St. Louis (ERS) adopted a resolution that closes all records “which are closed by law or may be closed by law” under the Sunshine Law<sup>1</sup> and its exceptions.

On April 27, 2011, reporters from the St. Louis Post-Dispatch made a Sunshine Law request for copies of “all pension database reports provided to

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<sup>1</sup> Section 610.010, RSMo *et seq.* All statutory citations are to RSMo Cum. Supp. 2011.

system actuaries for the year ending Sept. 31, 2010 ... includ[ing] information for members of the Retirement Payment system, the DROP Master, and the ERS Member databases.” In response, you provided the names of all active and terminated vested members of ERS, the names of all who receive a monthly pension benefit and its amount, the name of each retiree receiving a monthly DROP distribution and its amount, and the name of each person who received a lump sum or direct rollover of a DROP benefit and its amount. Exhibit D, page 2. You also said that all other information was either a closed record or might be a closed record under exceptions to the Sunshine Law found in § 610.021(5), (13), (14), (21), RSMo.

The Sunshine Law “shall be liberally construed” to require that records be open, and any “exceptions strictly construed[.]” § 610.011.1, RSMo; *Guyer v. City of Kirkwood*, 38 S.W.3d 412, 414 (Mo. banc 2001) (where one provision allowed record to be closed and other provision required it to be open, conflict would be resolved in favor of openness); *Great Rivers Environmental Law Center v. City of St. Peters*, 290 S.W.3d 732, 735 (Mo. App. E.D. 2009) (exceptions to Sunshine Law must be strictly construed). “The primary rule of statutory construction is to ascertain the intent of the legislature from the language used, to give effect to that intent if possible, and to consider words used in the statute in their plain and ordinary meaning.” *Howard v. City of Kansas City*, 332 S.W.3d 772, 779 (Mo. banc 2011). “Strict construction of a statute requires that the scope of the statute not be extended beyond its literal meaning and that the statute not be unreasonably interpreted.” *Snyder v. Consolidated Library Dist. No. 3*, 306 S.W.3d 133, 137 (Mo. App. W.D. 2010). Applying strict construction “does not require that the court ignore either common sense or evident statutory purpose.” *Irvin v. Bd. of Probation and Parole*, 34 S.W.3d 202, 205 (Mo. App. W.D. 2000). Where a statute’s terms are plain, it makes no difference “whether liberal or strict construction principles are applied.” *Snyder v. Consolidated Library Dist. No. 3*, 306 S.W.3d at 137.

The Sunshine Law generally provides that “all public records of public governmental bodies shall be open to the public for inspection and copying[.]” § 610.011.2, RSMo. There is no dispute that ERS is a “public governmental body” as defined by § 610.010(4), RSMo—it is a board that administers the pensions of public employees of the City of St. Louis and was created by the City. See *Travers v. Board of Trustees of Employees’ Retirement System of City of St. Louis*, 756 S.W.2d 623, 624-25 (Mo. App. E.D. 1988); §§ 4.16.100-

4.16.130, St. Louis City Revised Code, 2011. Therefore it is an “administrative ... entity created by ... order or ordinance of any political subdivision[.]” § 610.010(4), RSMo. Nor is there any dispute that the pension reports are “public records” as defined by § 610.010(6), RSMo—the reports are a “record ... retained by or of” ERS. Accordingly, if no exception to the Sunshine Law applies, all information in the reports must be disclosed upon request.

Exceptions to the Sunshine Law are generally found in § 610.021, RSMo, which provides, in pertinent part, as follows:

Except to the extent disclosure is otherwise required by law, a public governmental body is authorized to close meetings, records and votes, to the extent they relate to the following: ...

(13) Individually identifiable personnel records, performance ratings or records pertaining to employees or applicants for employment, except that this exemption shall not apply to the names, positions, salaries and lengths of service of officers and employees of public agencies once they are employed as such ... ;

(14) Records which are protected from disclosure by law.

The exception in subdivision fourteen operates so that where disclosure is forbidden or made discretionary in another section of the Missouri statutes or by federal statute, that is a valid exception to the Sunshine Law, though not specifically referenced in Chapter 610, RSMo. *Pulitzer Pub. Co. v. Missouri State Employees' Retirement System*, 927 S.W.2d 477, 481 (Mo. App. W.D. 1996); *Oregon County R-IV School Dist. v. LeMon*, 739 S.W.2d 553, 557 (Mo. App. S.D. 1987); see also *Scroggins v. Missouri Dept. of Social Services*, 227 S.W.3d 498, 500-503 (Mo. App. W.D. 2007).

Subdivision thirteen allows a public governmental body to completely close all records that “relate to ... individually identifiable personnel records[.]” § 610.021(13), RSMo. The only exception to this exception is for

“names, positions, salaries and lengths of service of officers and employees of public agencies once they are employed as such.” *Id.*

The term “personnel records” is not defined in the statute, so we look to the dictionary definition. This term is an exception to open records and therefore must be construed narrowly, § 610.011.1, RSMo; *Great Rivers Environmental Law Center v. City of St. Peters*, 290 S.W.3d at 735; the exception itself is worded broadly, by including records that merely “relate to” personnel records in the exception. § 610.021, RSMo. This evidences a legislative intent that these records generally may be closed.

The term “personnel” is defined as “a body of persons employed in some service.” *Webster’s Third New International Dictionary*, pg. 1687 (1993). “Personnel records” would presumably include those kept by a “personnel” or human resources staff or for the purposes usually assigned to or managed by such a staff. In that respect, “personnel” means “with respect to efficiency, training, service, and health,” or “the division of an organization concerned primarily with the selection, placement, and training of employees.” *Id.* Among “personnel files,” then, would be files relating to “efficiency, training, service, or health,” or to “selection, placement, and training.” They might also include records of an individual employee’s work and leave hours, contact information for the employee, social security numbers, information on marital status and dependents, and other information pertaining to the administration of benefits and the reporting and paying of taxes and garnishments.

Further, subdivision thirteen allows a public governmental body to completely close all records that “relate to ... individually identifiable ... records pertaining to employees[.]” § 610.021(13), RSMo. The scope of this exception has not been defined. Even considering that this exception must be construed narrowly, § 610.011.1, RSMo; *Great Rivers Environmental Law Center v. City of St. Peters*, 290 S.W.3d at 735, the broad wording shows that the legislative intent is to allow employment records to be closed, unless the records consist of or show names, positions, salaries, and lengths of service of public employees. § 610.021(13), RSMo; *Howard v. City of Kansas City*, 332 S.W.3d at 779 (primary rule of statutory construction is to give effect to legislative intent). Therefore, if individually identifiable records pertaining to employees exist in the ERS pension database records, and these records

are not the name, position, salary, and length of service of a public employee, these may be closed.<sup>2</sup>

Accordingly, it may be that, in the case of disclosure of individually identifiable records, § 610.011, RSMo, which provides that public records are to be open “unless otherwise provided by law,” should be construed to prohibit governmental disclosure of some records regarding individuals. *State ex rel. Praxair, Inc. v. Missouri Public Service Com’n*, 344 S.W.3d 178, 187, note 7 (Mo. banc 2011) (where possible, court will construe statute to

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<sup>2</sup> Additionally, although “[n]either the federal nor the Missouri constitutions expressly provide a right of privacy,” *North Kansas City Hosp. Bd. of Trustees v. St. Luke’s Northland Hospital*, 984 S.W.2d 113, 121 (Mo. App. W.D. 1998), quoting *Cruzan by Cruzan v. Harmon*, 760 S.W.2d 408, 417 (Mo. banc 1988), in two cases the Supreme Court of Missouri said that individuals do have a fundamental right of privacy in employment records, which include personnel records. *State ex rel. Crowden v. Dandurand*, 970 S.W.2d 340, 343 (Mo. banc 1998) (“Employees have a fundamental right of privacy in employment records.”); *State ex rel. Delmar Gardens North Operating, LLC v. Gaertner*, 239 S.W.3d 608, 611 (Mo. banc 2007) (“Missouri recognizes a right of privacy in personnel records that should not be lightly disregarded or dismissed.”). In the Sunshine Law context, courts have suggested that individuals may have a constitutional right to privacy in their individually identifiable records that could, in some situations, require the records to remain closed. *Chasnoff v. Board of Police Com’rs*, 334 S.W.3d 147, 152 (Mo. App. E.D. 2011) (if the Sunshine Law requires a governmental body to disclose an individual’s private information, the individual may be able to bring an independent lawsuit to prevent the disclosure, based upon a statutory or constitutional right to privacy); *North Kansas City Hosp. Bd. of Trustees v. St. Luke’s Northland Hospital*, 984 S.W.2d at 121-122 (disclosure of terms of contract with public body would not violate right to privacy); *City of Springfield v. Events Pub. Co.*, 951 S.W.2d 366, 372 (Mo. App. S.D. 1997) (individual’s right to privacy would not be violated where utility customer could request confidentiality and thus prevent disclosure under the Sunshine Law); *Hyde v. City of Columbia*, 637 S.W.2d 251, 263 (Mo. App. W.D. 1982) (where Sunshine Law failed to adequately protect individual’s right to privacy, court would construe statute so as to prevent the disclosure of the information). Because of our conclusion below that the records at issue may be closed under the terms of the statute itself, we do not explore the scope of or basis for constitutional protection.

avoid constitutional problems); *Hyde v. City of Columbia*, 637 S.W.2d at 263; § 610.011, RSMo (public records are to be open “unless otherwise provided by law”).<sup>3</sup>

Applying this law to the situation at hand, the ERS pension database records are “personnel” records because they are records kept by ERS about employees in order to administer their retirement benefits. And because they are kept by name and social security number, they are “individually identifiable.” ERS was thus entitled to close the records pursuant to § 610.021(13) and (14).

That does not mean that the records can be closed in their entirety, however. Again, the “personnel” exception does not cover “names, positions, salaries and lengths of service of officers and employees of public agencies once they are employed as such,” § 610.021(13), RSMo, so information in the records that is one of these items must be disclosed upon request. In the context of a request that the Missouri State Employees’ Retirement System disclose personal information of its members, a court held:

MOSERS is required to provide, if it has the information, the name, position, pension amount, and length of service of members who are receiving benefits, or have in the past. MOSERS may close all other individually identifiable personnel information, including but not limited to, the addresses and telephone numbers of members, thereby minimizing the risk of exploitation of vulnerable, elderly retirees by unscrupulous elements who might request blanket information for inappropriate purposes.

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<sup>3</sup> Although § 610.021(14), RSMo Cum. Supp. 2011, allows to be closed “[r]ecords which are protected from disclosure by law,” in that respect this exception is not, standing alone, a guarantee of a right to privacy, because this section only *allows* the records to be closed. Here, however, you indicated that ERS has chosen to close the records at issue, so there is no need to consider whether a right to privacy mandates closure.

*Pulitzer Pub. Co. v. Missouri State Employees' Retirement System*, 927 S.W.2d 477, 483 (Mo. App. W.D. 1996). By the same rule, ERS may close all individually identifiable personnel information other than name, position, salary, and length of service of officers and employees of public agencies.

Applying the exceptions in § 610.021, RSMo Cum. Supp. 2011, prohibiting the closing of the part of personnel and employee records that are the “names, positions, salaries and lengths of service of officers and employees of public agencies,” the information in the ERS database that concerns personnel who are not officers and employees of public agencies may be closed.<sup>4</sup> The name of the employee in the ERS pension database records has already been provided. As we understand them, none of the records contain information about the position of the employee. Nor do they contain the length of service of the employee; although they contain the data field for the employee’s “months of creditable service,” that is not the same as the employee’s “length of service,” due to differences in the manner in which eligibility to become a member of the pension plan is calculated. Therefore, this field may be a closed record.

The only other pertinent exception to the exception is “salaries” of the employees. Although retirement benefits are generally not considered as part of an employee’s salary, for purposes of the Sunshine Law, they are. *Pulitzer Pub. Co. v. Missouri State Employees' Retirement System*, 927 S.W.2d at 482. Therefore, the employee’s monthly pension benefit, and the employee’s payments under the DROP plan must be provided, and have been already. We note that the pension plan allows certain employees to voluntarily contribute additional money to the plan in order to increase their retirement benefits. § 4.16.070A, St. Louis Code. If these additional contributions are essentially a savings account, such as a deferred compensation account, then they are not part of an employee’s salary, and

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<sup>4</sup> The facts you provided state that some members of ERS are employees, but not employees of public agencies. As discussed above, the Sunshine Law allows “personnel records” and “records pertaining to employees” to be closed. § 610.021(13), RSMo. Because these individuals are not “employees of public agencies,” *id.*, their names, positions, salaries, and lengths of service do not need to be disclosed—that is, the exception to the exception does not apply to them. *Id.*

may properly be closed.<sup>5</sup> Further, because the year to date benefits is also considered “salary” under the Sunshine Law, as construed in *Pulitzer*, those must also be disclosed. Also, because the member’s final average compensation and bi-weekly compensation are measures of a person’s salary, and because that term is construed broadly, this information also is open. The amount of money that has accrued to a member’s DROP account is money the employee has a legal right to claim as compensation, which makes it a form of “salary” under the Sunshine Law, so the member’s DROP account balance must also be disclosed.

Payments made to an employee’s surviving spouse or children are not “salary” being paid to the employee—the employee is no longer receiving a salary, because the employee is deceased. However, payments to an employee’s surviving spouse or children are only made because it was part of the employee’s compensation, and these payments do not lose their character upon the death of the employee. Therefore, these payments must also be disclosed, though, the names and contact information of these beneficiaries are individually identifiable records that may properly be closed under § 610.021(13), RSMo. See *Pulitzer Pub. Co. v. Missouri State Employees’ Retirement System*, 927 S.W.2d at 482.

In contrast, the estimated vested inactive member’s amount of monthly pension benefit at normal service retirement date is not an employee’s salary. That is merely an estimate, applying a mathematical formula based on many variables, in order to help the individual employee better plan for retirement. ERS does not guarantee that the employee will receive that particular benefit amount at retirement. Therefore, the individual’s estimated amount of monthly benefit is not part of the member’s salary, and may be closed.

The rest of the information in the records may be legally closed. Every field is “individually identifiable personnel information” or “records

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<sup>5</sup> In *Pulitzer Pub. Co. v. Missouri State Employees’ Retirement System*, 927 S.W.2d at 483, the court required disclosure of benefit payments even if a result of investment income, rather than tax dollars. However, this language refers to returns on investments of state dollars made by MOSERS, not to an individual’s deferred compensation account.



pertaining to employees” that is not the employee’s name, position, salary, or length of service.<sup>6</sup>

In conclusion, Chapter 610, RSMo, generally requires records of public governmental bodies to be open, and the public employee pension database records qualify as such. But the Sunshine law allows a public governmental body to close personally identifiable personnel records and records pertaining to employees, which would include pension database records. The only exception to this allowance is that records of the name, position, salary, and length of service of public employees may not be closed. Accordingly, information in the records consisting of the names and payments to public employees must be disclosed, but the rest may remain closed.

Very truly yours,



**CHRIS KOSTER**  
Attorney General

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<sup>6</sup> There are 69 separate fields in the databases, containing the above listed information, and also information such as employee’s and spouse’s gender, date of birth, social security number, system identification number, amount of medical leave, whether they were on disability, the code for the place of employment, months of creditable service lost during certain time periods, etc. The information concerning whether the employee is on disability and how much medical leave remains to the employee is also a record that may be closed under § 610.021(5), RSMo Cum. Supp. 2011, which allows the closing of “[n]onjudicial mental or physical health proceedings involving identifiable persons, including medical, psychiatric, psychological, or alcoholism or drug dependency diagnosis or treatment.”